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BEFORE THE ARIZONA CORPORATION COMMISSION

REC'D
AZ CORP COMMISSION
DOCKET CONTROL

2015 FEB 5 AM 10 01

COMMISSIONERS

SUSAN BITTER SMITH, Chairman
BOB STUMP
BOB BURNS
DOUG LITTLE
TOM FORESE

ORIGINAL

In the matter of)
KENT MAERKI and NORMA JEAN)
COFFIN aka NORMA JEAN MAERKI, aka)
NORMA JEAN MAULE, husband and)
wife,)
DENTAL SUPPORT PLUS FRANCHISE,)
LLC, an Arizona limited liability company)
Respondents.)

DOCKET NO. S-20897A-13-0391

**SECOND MOTION FOR TELEPHONIC
TESTIMONY**

Arizona Corporation Commission

DOCKETED

FEB 05 2015

DOCKETED BY 

The Securities Division of the Arizona Corporation Commission requests leave to present the telephonic testimony of Paul Montgrain and Andre Sitbon in addition to Alfred Earl Holyoak, Jeff Eschrich, Glen Lacy and/or Edward Manzio (See Fifth Procedural Order) during the hearing in the above-referenced matter. Mr. Montgrain and Mr. Sitbon possess knowledge relevant to matters in dispute. Both Mr. Montgrain and Mr. Sitbon reside outside of Arizona. Requiring the out-of-state witnesses to appear in Phoenix, Arizona, would be prohibitively burdensome. Permitting these prospective witnesses to appear and give testimony telephonically solves this problem while facilitating the preservation and introduction of relevant information and a full opportunity for questioning by all parties. Accordingly, good cause exists for granting such leave and doing so would not infringe upon the Respondents' procedural due process rights. For these reasons, which are more thoroughly addressed in the following Memorandum of Points and Authorities, this motion should be granted.

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MEMORANDUM OF POINTS AND AUTHORITIES**I. Introduction**

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") anticipates calling Paul Montgrain and Andre Sitbon as central witnesses during the hearing in this matter. Both were salesmen and Mr. Sitbon is also an investor. The burden of traveling to Phoenix to provide testimony in person, however, is impractical for these witnesses because Mr. Montgrain resides in Colorado and Mr. Sitbon resides in Texas. The simple and well-recognized solution to this problem is to permit them to testify telephonically. Through this manner, not only will relevant evidence be preserved and may be introduced, but all parties will have a full opportunity for questioning, whether by direct or cross-examination of these witnesses.

II. Argument**A. Good cause exists for permitting telephonic testimony.**

"When considering telephonic testimony, the initial inquiry should be whether good cause has been shown for its use." *In re HM-2008-000867*, 225 Ariz. 178, 182, 236 P.3d 405, 409 (2010). "In determining whether good cause has been demonstrated, the court may consider whether the hearing can conveniently be continued to allow in-person testimony." *In re HM*, 225 Ariz. at 181 n.4, 236 P.3d at 408 n.4. "It may also consider the costs of bringing experts or other witnesses to court...." *Id.* In the instant case, the above witnesses possess relevant knowledge of the subject investment offer and sale, the Respondents' business practices, and related documents, but, because they reside in other states, or will be out-of-state for various reasons, they are practically unavailable for in-person testimony.

Both Mr. Montgrain and Mr. Sitbon live out of state. They would be unavailable to testify in person even on a rescheduled hearing date. Additionally, the cost of bringing the witnesses to Phoenix would be prohibitively expensive for the Division. Permitting the witnesses to appear telephonically would greatly reduce the burden of presenting their testimony on both the witnesses and the Division.

1 Therefore, good cause exists for permitting the above-referenced witnesses to testify by
2 telephone.

3 **B. Permitting telephonic testimony does not infringe upon the Respondent's procedural**
4 **due process rights and is within the Commission's administrative rules and practice.**

5 Upon finding good cause for using telephonic testimony, consideration should be given to
6 "whether admission of telephonic testimony comported with due process." *In re HM*, 225 Ariz. at
7 182, 236 P.3d at 409. What constitutes due process "is not a technical conception with a fixed
8 content unrelated to time, place and circumstances," but, rather, takes into account "such
9 procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319,
10 334 (1976) (internal quotations omitted). In a civil administrative proceeding, procedural due
11 process requires balancing: (1) the individual's interests; (2) government's interests; and (3) the
12 "likely impact of telephonic testimony on the accuracy and fairness of the process." *In re HM*, 225
13 Ariz. at 182, 236 P.3d at 409.

14 The competing interests are protected by procedural safeguards inherent in telephonic
15 testimony. Individuals have an interest in due process, property and liberty. Government interests
16 typically include, among other things, protecting the public from harm (*id.*) and in "conserving
17 fiscal and administrative resources." *Mathews*, 424 U.S. at 347-48. Witnesses appearing by
18 telephone are subject to cross examination. *In re HM*, 225 Ariz. at 182, 236 P.3d at 409.
19 Moreover, telephonic testimony "preserves paralinguistic features such as pitch, intonation, and
20 pauses that may assist an ALJ in making determinations of credibility." *T.W.M. Custom Framing*
21 *v. Indus. Comm'n of Ariz.*, 198 Ariz. 41, 48, 6 P.3d 745, 752 (App. 2000). At the same time,
22 appearing telephonically preserves state resources that would otherwise have to be spent on travel
23 and accommodations. Accordingly, telephonic testimony "does not significantly increase the risks
24 of an erroneous deprivation." *In re HM*, 225 Ariz. at 182, 236 P.3d at 409 .

25 Permitting telephonic testimony would have minimal negative impact on the accuracy and
26 fairness of the evidentiary process. The witnesses at issue, though appearing by telephone, would
be still be subject to cross examination by the Respondents and the Court could still make

1 determinations of credibility based the manner in which the witnesses testify. Furthermore,
2 permitting telephonic testimony would enable the Division to present evidence that furthers the
3 Commission's interests in protecting the public from the harm allegedly committed by the
4 Respondents and in conserving its financial and administrative resources. Therefore, permitting
5 the above witnesses to testify by telephone does not infringe upon the Respondents' procedural
6 due process rights.

7 In addition, the Arizona Corporation Commission promulgated the Commission's Rules of
8 Practice and Procedure that are intended to "be liberally construed to secure just and speedy
9 determination of all matters presented to the Commission." *See* A.A.C. R14-3-101(B). They
10 encompass the use of other forms of testimony during administrative hearings. More specifically,
11 Rule R14-3-109 states, "In conducting any investigation, inquiry, or *hearing*, neither the
12 Commission, nor any officer or employee thereof shall be bound by the technical rules of
13 evidence, and no informality in any proceeding or *in the manner of taking of testimony* shall
14 invalidate any order, decision, rule, or regulation made, approved, or confirmed by the
15 Commission." *See* A.A.C. R14-3-109(K) (emphasis added).

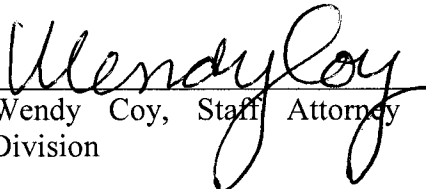
16 In light of the relaxed evidentiary and procedural rules governing administrative hearings
17 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
18 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
19 telephonic testimony in its administrative hearings to introduce probative evidence. *See, e.g., In*
20 *the matter of Theodore J. Hogan and Associates, et al.*, Docket No. S-20714A-09-0553, *In the*
21 *matter of Edward A. Purvis, et al.*, Docket No. S-20482A-06-0631; *In the matter of Yucatan*
22 *Resorts, Inc., et al.*, Docket No. S-03539A-03-0000; *In the matter of Forex Investment Services*
23 *Corporation et al.*, Docket No. S-03177A-98-0000. Therefore, permitting the above witnesses to
24 testify by telephone is consistent with the rules and customary practice in administrative hearings
25 before the Commission.

26 . . .

1 **III. Conclusion**

2 Permitting Paul Montgrain and Andre Sitbon in addition to Alfred Earl Holyoak, Jeff
3 Eschrich, Glen Lacy and/or Edward Manzio to testify telephonically at the upcoming
4 administrative hearing allows the Division to present relevant witness evidence that is expected to
5 be reliable and probative, is fundamentally fair, and does not compromise Respondents' due
6 process rights. Therefore, the Division respectfully requests that its motion for leave to present
7 such telephonic testimony be granted.

8 RESPECTFULLY SUBMITTED this 5th day of February, 2015.

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11 Wendy Coy, Staff Attorney for the Securities
12 Division
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SERVICE LIST FOR: KENT MAERKI and NORMA JEAN COFFIN aka NORMA JEAN MAERKI, aka NORMA JEAN MAULE, husband and wife, DENTAL SUPPORT PLUS FRANCHISE, LLC

ORIGINAL and 9 copies of the foregoing filed this 5th day of February, 2015, with:

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COPY of the foregoing hand-delivered this 5th day of February, 2015, to:

The Honorable Marc E. Stern
Administrative Law Judge
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

COPY of the foregoing mailed this 5th day of February, 2015, to:

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